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No. 03-701

In The

Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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United States General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction,* GAO-04-297 (Feb. 27, 2004), available at http://www.gao.gov/new.items/d04297.pdf 1, 2, 3

After the Deatons filed their Reply Brief, the United States General Accounting Office (GAO) released a report assessing the Corps's CWA jurisdictional practices. *See* Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction,* GAO-04-297 (Feb. 27, 2004).[1] The GAO Report documents the different and often contradictory approaches, both among and within the Corps's districts, regarding whether a particular feature qualifies as a "tributary" (*id.* at 20-22) or an "adjacent" wetland (*id.* at 17-20), under the CWA.[2] The GAO Report also concludes that there is no consistency within the Corps on whether ditches and other man-made conveyances are subject to federal regulation. *Id.* at 22-26. The Supplemental Brief in *Newdunn Assocs. LLP v. U.S. Army Corps of Eng'rs* (No. 03-637, filed March 7, 2004), provides more specific examples from the GAO Report, and we respectfully cross-reference that submission.

The GAO Report refutes the Corps's claim here that it is "entitled to judicial deference" (U.S. Br. 20). GAO recognized that "[t]he federal government has argued in court" that it may regulate nonnavigable ditches as

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[1] Available at http://www.gao.gov/new.items/d04297.pdf (last visited March 17, 2004).

[2] *See, e.g.,* GAO Report at 3 ("Districts apply different approaches"); *id.* ("differences in identifying jurisdictional limits"); *id.* at 4 (districts need "[t]o provide greater clarity to the regulated community"); *id.* at 18 ("districts varied"); *id.* at 20 (districts "could differ significantly"); *id.* at 23 ("three different district staff" would probably make "three different assessments"); *id.* at 25 ("contrast" among districts).

tributaries "because any pollutant or fill material that degrades water quality in a tributary has *the potential* to move downstream and degrade the quality of navigable waters themselves." GAO Report at 7 (emphasis added).[3] But GAO also found that the Corps's actual practices in the field vary significantly from the litigation position it has advanced to the courts. The Fourth Circuit, unaware of the rampant administrative inconsistencies, determined that "deference is appropriate" (Pet. App. 21a), and held that "the word 'tributaries'... means what the Corps says it means." (*Id.* 20a). But the GAO Report shows that the Corps does not know what the word "tributary" means, nor how to identify a "tributary" (or an "adjacent" wetland). Furthermore, GAO found that few Corps districts actually disclose "their practices for making jurisdictional determinations" to the public. GAO Report at 27. Notwithstanding this lack of fair notice, the Corps persists in pursuing enforcement actions against citizens like the Deatons.

Thus, we are left with an inconsistent patchwork of jurisdictional determinations, and a government litigation position that is unsupported by any rulemaking record or other documentation. As the Deatons have argued, this type of ad hoc decisionmaking is precisely the kind of situation where *Chevron* deference is *not* due. (Pet. 25-28.) The situation here stands in sharp contrast to *Riverside Bayview,* where an administrative record, developed after years of notice and comment rulemaking, supported the

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[3] The language used by GAO to characterize the Corps's position is taken verbatim from the Fourth Circuit's commerce clause analysis in *Deaton. See* Pet. App. 13a ("Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves").

Corps's jurisdiction over adjacent wetlands that actually abut truly navigable waters. (Pet. 27 n. 12.)

As the Deatons point out, the Fourth Circuit should have followed *SWANCC* and searched for a clear statement (which does not exist) that Congress intended to regulate the roadside ditch at issue as a "navigable water." (Pet. 23-25.) Instead, the Fourth Circuit bypassed the clear statement rule and extended *Chevron* deference. The GAO Report confirms that affording such deference to the Corps was erroneous.

With no rulemaking forthcoming from the agencies, the only chance for greater clarity on the scope of "navigable waters" rests with this Court.

CONCLUSION

The petition for a writ of certiorari should be granted

March 18, 2004

Respectfully submitted,

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